OPINION OF ADVOCATE GENERAL COSMAS

delivered on 10 February 2000 *

A — Introduction

1. By the present reference for a preliminary ruling pursuant to Article 177 of the EC Treaty (now Article 234 EC) the Bundesfinanzhof has submitted a question to the Court regarding the rules governing the accumulation of an original and a special reference quantity that had been allocated to a milk producer within the framework of the provisions of Community law on the common organisation of the market in milk and milk products. Specifically, the Court is asked, in this reference, whether Article 3a(3), first sentence, of Council Regulation (EEC) No 857/84 of 31 March 1984 adopting general rules for the application of the levy referred to in Article 5c of Regulation (EEC) No 804/68 in the milk and milk products sector, [1] as amended by Council Regulation (EEC) No 1639/91 of 13 June 1991, [2] a provision incorporated in Article 4(3), first sentence, of Council Regulation (EEC) No 3950/92 of 28 December 1992 establishing an additional levy in the milk and milk products sector, [3] is to be interpreted as meaning that a milk producer is also to be allocated a final special reference quantity when he has not used the period mentioned in the said provision to use the reference quantity provisionally allocated to him to achieve a corresponding increase in his milk production, but has temporarily transferred to another holding the part of his milk quota which corresponds to the original reference quantity at the disposal of his holding in addition to the provisionally allocated special reference quantity.

II — Legal framework under Community law

2. In order to set limits on the overproduction of milk and milk products in the Common Market, Council Regulation (EEC) No 1078/77 of 17 March 1977 [4] introduced a system of premiums for farmers who either undertook to not to market milk or milk products (non-marketing premium), or agreed to convert their dairy herds into meat-producing herds (conversion premium). The non-marketing and conversion premiums were granted, on request, to producers who undertook, for

* Original language: Greek.

1 — OJ 1984 L 90, p. 13.

2 — OJ 1991 L 150, p. 35.

3 — OJ 1992 L 405, p. 1.

4 — Council Regulation (EEC) No 1078/77 of 17 May 1977 introducing a system of premiums for the non-marketing of milk and milk products and for the conversion of dairy herds (OJ 1977 L 131, p. 1).

a period of five years, not to market milk or to convert their herds respectively.

3. In view of the constant increase in milk production, the Council introduced, in addition, by means of Regulation (EEC) No 856/84 of 31 March 1984 [5] an additional levy which, pursuant to Article 1 of that regulation, is imposed on quantities of milk delivered in excess of a reference quantity to be determined; the levy is to be paid either by the milk producers (Formula A) or by the purchasers of milk and other milk products, who pass on the levy to those producers who have increased deliveries, this being done in proportion to the producer's contribution to the amount exceeding the purchaser's reference quantity (Formula B). How to calculate the reference quantities, that is to say, those quantities which are exempt from the additional levy, is set out in Regulation No 857/84, cited above. Under that regulation, the reference quantity corresponds to the quantity of milk which was delivered by the producer in the 1981 calendar year plus 1%. However, the Member States are free to provide that the reference quantity for their territory is to correspond to the quantities of milk or milk equivalent delivered in the 1982 or 1983 calendar years, there being applied to that quantity a percentage rate so established as to ensure that the guaranteed quantity for the Member State in question is not exceeded.

4. In accordance with the judgments of 28 April 1988 in *Mulder* [6] and *von Deetzen*, [7] in which Regulation No 857/84 was declared invalid to the extent that it did not provide for the allocation of reference quantities to those producers, who, on the basis of Regulation No 1078/77, cited above, had not delivered any milk during the reference year chosen by the Member State in question, the Council adopted Regulation (EEC) No 764/89 of 20 March 1989 [8] amending Regulation No 857/84. Regulation No 764/89 inserted a new Article 3a into Regulation No 857/84, according to which, under certain conditions (which are primarily intended to ensure that producers genuinely intend to resume milk production and are in a position to do so) a special reference quantity can be allocated to producers who had undertaken, pursuant to Regulation No 1078/77, not to market any milk or to convert their herds and, as a consequence, were excluded from the allocation of an original reference quantity (hereinafter 'the SLOM I regime'). [9]

5. In its judgments of 11 December 1990 in *Spagl* [10] and *Pastätter* [11] the Court declared Article 3a of Regulation No 857/84 as

5 — Council Regulation (EEC) No 856/84 of 31 March 1984 amending Regulation (EEC) No 804/68 on the common organisation of the market in milk and milk products (OJ 1984 L 90, p. 10).

6 — Case 120/86 *Mulder* v *Minister van Landbouw en Visserij* [1988] ECR 2321.

7 — Case 170/86 *Von Deetzen* v *Hauptzollamt Hamburg-Jonas* [1988] ECR 2355.

8 — Council Regulation (EEC) No 764/89 of 20 March 1989 amending Regulation (EEC) No 857/84 adopting general rules for the application of the levy referred to in Article 5c of Regulation (EEC) No 804/68 in the milk and milk products sector (OJ 1989 L 84, p. 2).

9 — The term 'SLOM' comes from the Dutch 'schlachtoffers omschakeling' which means 'conversion victims'. The acronym SLOM was previously used in Dutch practice. It comes from 'Stopzetting Leveranties en Omschakeling Melkproduktie', which means 'Stoppage of Delivery and Conversion of Milk Production'.

10 — Case C-189/89 *Spagl* v *Hauptzollamt Rossenberg* [1990] ECR I-4539.

11 — Case C- 217/89 *Pasttaetter* v *Hauptzollamt Bad Reichenhall* [1990] ECR I-4585.

amended by Regulation No 764/89 invalid to the extent that it excluded producers, whose non-marketing or conversion period under Regulation No 1078/77 had expired before 31 December 1983, or, as the case might be, 30 September 1983, from the allocation of a special reference quantity pursuant to that provision and to the extent that it limits the special reference quantity to 60% of the quantity of milk or milk equivalent sold by the producer during the 12 calendar months preceding the month in which the application for the non-marketing or conversion premium had been made. Complying with those judgments, the Council adopted Regulation No 1639/91 amending Regulation No 857/84 with the result that the allocation of a special reference quantity became possible in the abovementioned cases, where it had previously been excluded.

6. More specifically, Article 3a of Regulation No 857/84 as amended by Regulation No 1639/91 (hereinafter 'the SLOM II regime') provides:

'1. Producers referred to in the third paragraph of Article 12(c):

— whose period of non-marketing or conversion, pursuant to the undertaken given under Regulation No 1078/77 expires without prejudice to the provisions of the last subparagraph, after 31 December 1983 or after 30 September 1983 in Member States where the milk collection in the months April to September is at least twice that of the months October to the March of the following year;

— who, being premium transferees, have not received a reference quantity pursuant to Article 2 and/or Article 6 of the Regulation;

shall receive provisionally, if they so request within three months from 29 March 1989, a special reference quantity and provided that such producers ...

Producers,

— whose period of non-marketing or conversion in performance of the undertaking given under Regulation No 1078/77, expired in 1983 or, in the case referred to in the first indent of the first subparagraph during the period 1 January to 30 September 1983 inclusive, or as the case may be, after the dates set out in the first indent of the first subparagraph if they had received a reference quantity in respect of holdings having been the subject of a non-marketing or conversion premium, on the terms referred to in Article 5(4)(b) and/or Article 9(2) of Regulation (EEC) No 1546/88 or on the terms referred to in Article 2 of this Regulation if the Member State has not

applied the said Article 9(2) and who, being premium transferees, have not received a reference quantity on the terms referred to in Article 2 and/or Article 6 of this Regulation,

or

— who have received the holding through an inheritance or similar means following expiry of the undertaking entered into under Regulation No 1078/77 by the originator of the inheritance, albeit before 29 June 1989,

shall receive on a provisional basis, on application submitted within a time limit of three months from 1 July 1991, a special reference quantity on the terms laid down in ...

...

3. If, within two years of 29 March 1989 or, in the case referred to in the last subparagraph of paragraph 1, from 1 July 1991 provided that the additional levy scheme is extended, the producer can prove, to the satisfaction of the competent authority, that he has actually resumed direct sales and/or deliveries and that the direct sales and/or deliveries reached a level greater than or equal to 80% of the provisional reference quantity during the last 12 months, the special reference quantity shall be definitively allocated to him. If this is not the case, the special reference quantity definitively allocated shall be equal to the quantity actually delivered or sold directly, and the balance shall be returned to the national reserve. The level of actual direct sales and/or deliveries shall be determined taking into account the production trend on the producer's holding, seasonal conditions and any exceptional circumstances.

4. That part of the special reference quantity which is not intended for use during a 12-month period may not be the subject of a temporary transfer as referred to in Article 5c(1a) of Regulation No 804/68.'

7. Regulation No 857/84 was repealed, with effect from 1 April 1993, by Council Regulation (EEC) No 3950/92 of 28 December 1992 establishing an additional levy in the milk and milk products sector, [12] which provided that the existing quota system was to apply, subject to certain changes, for a further seven years. In Article 4(3) of that regulation Article 3a(3) of Regulation No 857/84 was enacted in modified form:

'3. If a producer who has provisionally received a specific individual reference quantity pursuant to the last subparagraph of Article 3a(1) of Regulation No 857/84 can prove before 1 July 1993 to the satisfaction of the competent authority that he has actually resumed sales and/or deliveries and that his direct sales and/or his deliv-

12 — OJ 1992 L 405, p. 1.

eries have in the course of the preceding 12 months reached a level equal to or higher than 80% of the provisional reference quantity, he specific reference quantity shall be allocated definitively to him.'

8. By its judgment of 3 December 1992 in *Wehrs*, [13] the Court declared Article 3a(1), second indent, of Regulation No 857/84, as amended by Regulation No 764/89, which introduced the 'anti-accumulation' rule, invalid, in so far as it excluded from the award of a special reference quantity those producers, who had taken over a premium granted pursuant to Regulation No 1078/77, and who had been granted a reference quantity under Article 2 of Regulation No 857/84. As a result of that judgment, the Council enacted Regulation (EEC) No 2055/93 of 19 July 1993, [14] enabling those producers who were prevented by the 'anti-accumulation rule' from being awarded a special reference quantity under Article 3a of Regulation No 857/84 as amended by Regulation No 1639/91 to obtain, under certain conditions, such a reference quantity (hereinafter: 'the SLOM III regime').

9. More specifically, Article 1(1) of Regulation No 2055/93 provides:

'[A] producer, within the meaning of Article 9(c) of Regulation (EEC) No 3950/92, who:

— is the transferee of a non-marketing or conversion premium pursuant to Regulation (EEC) No 1078/77 and is not eligible pursuant to Article 3a of Regulation (EEC) No 857/84 as a consequence of having received a reference quantity pursuant to Article 2 or 6 of that regulation, or

— has taken over part of a holding subject to the same provisions but for which no reference quantity has been allocated pursuant to Article 3a of Regulation (EEC) No 857/84,

shall receive a special reference quantity on request, provided that:

— he establishes in support of his application, on the basis of criteria to be determined, that he is able to increase production on his holding by the amount of the special reference quantity applied for.'

13 — Case C-264/90 *Heinrich Wehrs* v *Hauptzollamt Luneburg* [1992] ECR I-6285.

14 — Council Regulation (EEC) No 2055/93 of 19 July 1993 allocating a special reference quantity to certain producers of milk and milk products (OJ 1993 L 187, p. 8).

III — Facts

10. The applicant in the main proceedings is a milk producer. As stated in the order for reference, on 1 April 1991 he had available to him an original reference quantity of 50 704 kg. [15] In October 1991 he was allocated an additional special delivery reference quantity consisting of 20 380 kg under the SLOM II regime, despite the fact that the 'anti-accumulation rule' contained in Article 3a(1), second indent, of Regulation No 857/84 as amended by Regulation No 1639/91 was still in force. [16] Between April 1992 and February 1993 the applicant had delivered 14 272 kg of milk. [17] He leased out his original reference quantity for that period. Subsequently he discontinued milk deliveries entirely.

11. Examining the legal basis of the reference quantities allocated to the applicant, the national court points out that the applicant's reference quantity — apart from the original delivery reference quantity to which the applicant is unquestionably entitled under Article 2 of Regulation No 857/84 — is a result of the provisional determination of a special reference quantity pursuant to Article 3a of Regulation No 857/84, in so far as that provisional determination can be converted into a final one. The national court maintains that the reason for the determination of a special reference quantity in accordance with the said provision was that the applicant had taken over the lease of an additional holding for which a non-marketing undertaking had been entered into under Regulation No 1078/77. The legal basis for the allocation of a special reference quantity to such a producer was provided for the first time by Regulation No 764/89, which, however, did not operate to the applicant's benefit because his non-marketing undertaking had expired before 31 December 1983, namely on 1 May 1983, and he was therefore excluded from being awarded a special reference quality pursuant to Article 3a(1), first indent, of Regulation No 857/84 as amended by the aforementioned regulation. However the allocation of a special reference quantity to the applicant becomes possible on the basis of the new version of Article 3a, which permits the allocation of special reference quantities also to those producers whose non-marketing periods had already expired in 1983. It was in consequence of this that the applicant was provisionally awarded a special reference quantity pursuant to Article 3a(1) of Regulation No 857/84, as amended by Regulation No 1639/91, notwithstanding the prohibition on accumulation then in force under Article 3a(1), second indent, of Regulation No 2055/93, which was only repealed by Regulation No 2055/93 and which, in the case of the applicant, whose holding already benefited from an original reference quantity, might have been applicable.

15 — In his written observations, and in his reply to the Court's written question as to whether or not his constitutes a single holding, the applicant states that he has been operating his father's holding, comprising an area of 12.5 ha, in the capacity of tenant farmer since as early as November 1977, and that, moreover, since October 1980 he has been letting the entirety of the farmland which his uncle had used for milk production, and for which his uncle had received a non-marketing premium. The applicant then entered into the non-marketing undertaking himself, which expired on 30 April 1983. By decision of 14 May 1984 he was awarded a reference quantity of 52 800 kg in respect of his holding.

16 — The applicant contends that he had applied for this special reference quantity on the ground that he was a producer having entered into an non-marketing undertaking. He maintains in particular, that he had asked the competent official at the dairy whether this option was open to him.

17 — The applicant maintains that between October 1991 and 28 February 1993, he delivered 30 051 kg of milk to the purchasing authority as part of his provisional reference quantity under the SLOM II regime.

12. As stated in the order for reference, the competent German authority, the Hauptzollamt (Principal Customs Office, hereinafter: 'the HZA'), refused [18] the definitive allocation of a special delivery reference quantity as applied for by the applicant on the ground that he had failed to deliver any milk from the reference quantity provisionally allocated to him, and fixed the definitive special delivery reference quantity at 0 kg. The HZA was of the opinion that the effectiveness of the prohibition on leasing out the provisional reference quantity, as laid down in Article 3a(4) of Regulation No 857/84, would be undermined and the required actual production of the allocated milk quantities by the person entitled to them would not be achieved if he were able to lease out an original reference quantity attaching to his holding during the period specified in Article 3a of Regulation No 857/84, as amended by Regulation No 1639/91.

13. The Finanzgericht of Rheinland-Pfalz dismissed the action brought against the abovementioned decision. The applicant subsequently appealed to the Bundesfinanzhof which is uncertain as to whether the applicant fulfils the requirement for the award of a definitive special reference quantity. It therefore decided to stay proceedings and refer the following question to the Court for a preliminary ruling:

'Is the first sentence of Article 3a(3) of Regulation (EEC) No 857/84, as amended by Regulation (EEC) No 1639/91, to be interpreted as meaning that a milk producer is to be allocated a definitive special reference quantity even where, in the period laid down in that provision, he did not use the special reference quantity provisionally allocated to him for a corresponding increase in his milk production, but temporarily transferred to another business that part of his milk quota corresponding to the original reference quantity held by his business in addition to the provisionally allocated special reference quantity?'

IV — My view of the case

14. I shall undertake a substantive analysis of the question referred to the Court (B), but first will deal with the question raised by the Commission in regard to the choice of the provision of Community law to be interpreted (A).

18 — According to information provided by the Commission, this refusal was contained in a decision of 6 July 1994.

A — Choice of the provision to be interpreted

15. The Commission states that the HZA's decision, which is the subject of the case in the main proceedings, was adopted on the basis of Article 4(3) of Regulation No 3950/92 and not on the provision mentioned in the national court's order for reference, namely Article 3a(3), first sentence, of Regulation No 857/84, as amended by Regulation No 1639/91. Regulation No 857/84 had been repealed by the time the decision was adopted, whereas Regulation No 3950/92 was already applicable. The two provisions are, however, identical, so that the point whether the Court's reply to the question would be of any use does not arise. The Commission merely proposes to reformulate the question so as to identify the correct provision.

16. It should be pointed out that the order for reference specifies neither the date nor the legal basis of the decision which was adopted by the HZA and is at issue in the main proceedings. Since it is in principle for the national court to choose the provision of Community law whose interpretation it considers to be of assistance in deciding the case before it, the Court of Justice is bound by this choice in so far as it does not find that the national court has committed a manifest error.

17. In the present case it must be emphasised that Regulation No 3950/92 was repealed by Regulation No 857/84,[19] but 'without prejudice to the obligations and undertakings entered into under the said regulation'.[20] However, because Regulation No 3950/92 entered into force on 3 January 1993, with effect from 1 April 1993,[21] that is to say, before 1 July 1993, and after the decisive period laid down in Article 3a(3), first sentence, of Regulation No 857/84 as amended by Regulation No 1639/91 had expired, the Community legislature, when it adopted transitional rules essentially intended to provide clarification, considered it useful to repeat the previously applicable provisions in Article 4(3) of the new regulation.

18. The fact that the old and new provisions are identical in content, a fact also pointed out by the Commission itself, leads to the conclusion that from the point of view of transitional law no substantive question arises as to the choice between the two provisions. The only question of this nature which might possibly arise concerns the probable need for a systematic interpretation of the conditions for converting the provisional special reference quantity into a definitive reference quantity. In the light of the abovementioned recitals relating to the contested provision of Regulation No 3950/92, it appears that the Community legislature had allowed itself to be guided by the letter and spirit of Regulation No 857/84, which, as I will show presently, is also in conformity with the principle of legal certainty. As against

19 — See Article 12 of Regulation No 3950/92.

20 — See the second recital in the preamble to Regulation No 3950/92 as cited in footnote 3.

21 — See Article 13 of the Regulation.

this, it might possibly be argued, in connection with the procedural provisions and the consequences of such a conversion, that the provisions contained in Regulation No 3950/92 are to be applied. However, this does not in any way affect the Court's answer to the present preliminary question, since none of the issues which arose in the main proceedings concerns either procedural provisions or the consequences of converting a provisional special reference quantity into a definitive reference quantity.

19. On the basis of the foregoing considerations, I am of the opinion that the choice which the national court has made with regard to the provision of Community law to be interpreted can be respected without at the same time denying that the Commission's argument may be correct, and that this can be done simply by reformulating the question in clear terms so as to include mention of both regulations. Specifically, I propose to proceed on the basis that the national court is essentially asking whether the provision contained in Article 3a(3), first sentence, of Regulation No 857/84 as amended by Regulation No 1639/91, a provision which was incorporated in Article 4(3), first sentence, of Regulation No 3950/92, is to be interpreted as meaning that a milk producer can be allocated a definitive special reference quantity also where during the period laid down in the said provision he has not used the reference quantity provisionally allocated to him to achieve a corresponding increase in milk production, but has temporarily transferred to another holding that part of his milk quota which corresponds to the original reference quantity allocated to his holding in addition to the provisionally allocated special reference quantity.

B — Substance

20. The question which the Bundesfinanzhof has referred for a preliminary ruling in the present case forms part of the more general issue concerning the rules governing the allocation of a special reference quantity under the provision contained in Article 3a(3), first sentence, of Regulation No 857/84, as amended by Regulation No 1639/91 and incorporated in Article 4(3), first sentence, of Regulation No 3950/92, to a milk producer who has already obtained an original reference quantity under Article 2 of Regulation No 857/84.

21. The accumulation of both these reference quantities, which, as stated above, was prohibited by virtue of Article 3a(1), second indent, of Regulation No 857/84 as amended by Regulations Nos 764/89 and 1639/91 ('anti-accumulation rule'), was then allowed and regulated by Regulation No 2055/93. The particularity of this case lies, however, in the fact that the special reference quantity was provisionally allocated to the applicant in October 1991, that is to say, prior to the entry into force of Regulation No 2055/93 and at a time when the 'anti-accumulation' rule was still in force. The first question which must be examined is, therefore, whether Regulation

No 2055/93 can be applied to the facts at issue in the main proceedings (a).

22. As I shall explain later, this question must be answered in the negative; neither the retroactive application of Regulation No 2055/93 nor its application by analogy would seem to be permissible. In light of this answer, the second question which arises concerns the definitive determination of the legal provisions governing the situation of those producers who find themselves in the same situation as the applicant, namely those who, during the same period as the applicant, were able to accumulate both an original and a provisional special reference quantity on the basis of the administrative practice of the competent national authorities to the extent that those quantities were determined by the abovementioned provisions of Community law (b).

(a) *The possibility of applying Regulation No 2055/93 to the facts in the main proceedings*

23. The Commission provides an interpretation of Regulation No 2055/93 which, it proposes, the Court should apply to the facts in the main proceedings. Even though this interpretation appears to be fundamentally correct, I nevertheless take the view that the application of that regulation to the situation of the applicant and those producers who may find themselves in the same situation as his, is not permissible from the point of view of transitional law.

24. The Commission submits that under Article 1(1), final indent, of Regulation No 2055/93 a producer who has already been allocated an original reference quantity is eligible to receive an additional special reference quantity only if he is able to increase production on his holding by the amount of the special reference quantity applied for. The producer must therefore make use of this special reference quantity in order to increase milk production, that is to say, in order to deliver more than his original reference quantity. In other words, he must deliver both quantities which he possesses ('original' and 'special') and may not, for example, lease out one of them.

25. That interpretation of Regulation No 2055/93 would appear to be correct. First, it should be pointed out that that regulation, which aims to bring Community law into full conformity with the judgment in *Wehrs*,[22] for the first time acknowledged and simultaneously regulated the possibility of accumulating a special reference quantity originally provided for Article 3a of Regulation No 857/84 with an original reference quantity allocated pursuant to Articles 2 and/or 6 of that Regulation. It should next be noted that Regulation No 2055/93 refers in its

22 — See footnote 13.

preamble to the fact that, in the context of that accumulation, the conditions for the definitive allocation of a special reference quantity to a producer who has already been awarded an original reference quantity cannot be the same as those applicable under Article 3a of Regulation No 857/84 to a producer who has not been awarded such a primary quota, because in the second case the producer, who should have completely suspended his milk-producing activity, is in fact required to resume it, whereas in the first case, the recipient of a special reference quantity is an active milk producer. [23] It is for this reason that Article 1(1), last indent, of that regulation provides that the producer in question must demonstrate 'that he is able to increase production on his holding by the amount of the special reference quantity applied for', which means that the entirety of his milk production must be at least equal to the sum of the original reference quantity and the additional special reference quantity. The wording of this provision would therefore seem to indicate that it is not sufficient for the producer in question to resume the production previously suspended in respect of the part of his holding for which he had received a non-marketing or conversion premium under Regulation No 1078/77 and to increase that production to the level of the special reference quantity, but that he must continue the production corresponding to the original reference quantity and increase it to meet the special reference quantity applied for. That the undertaking to increase production concerns the entire holding of the producer in question, namely not only the part on which production was relinquished but also the part for which production is continued, can, finally, also be inferred from the criteria which, according to Article 2(2) of Commission Regulation (EEC) No 2562/93 of 17 September 1993, [24] are to be taken into account in determining whether the producer is able to attain the reference quantity applied for by increasing production on his holding. [25]

26. The Commission argues that the provision of Regulation No 2055/93, as construed above, is to be applied to the applicant's situation.

27. Specifically, the Commission maintains that, pursuant to Regulation No 857/84, as

23 — See the seventh recital of the preamble to Regulation No 2055/93 (cited above in footnote 14).

24 — OJ 1993 L 235, p. 18.

25 — In particular, Article 2(2) states as follows: '[T]he criteria to be taken into account when establishing a producer's ability to increase output on his holding up to the amount of the special reference quantity applied for shall include, in particular:
— the quantity of milk marketed before 1 April 1993 in excess of the reference quantity allocated to the producer,
— the number and breed of female domestic bovine animals at least six months old, suitable for producing milk for marketing, kept by the producer on the holding at the time of the request,
— the holding's area under forage within the meaning of Article 1(1)(d) of Commission Regulation (EEC) No 1391/78,
— the investment carried out with a view to increasing milk production on the holding'.

amended by Regulation No 1639/91, producers such as the applicant, who had already been awarded an original reference quantity, would not be entitled to a provisional special reference quantity. This means that the question as to the conditions under which the special reference quantity could have been definitively allocated never arose for the Community legislature. It was for this reason that those conditions were not mentioned in Article 3a of Regulation No 857/84 and that Article 3(1) of that regulation, which later became Article 4(3), first sentence, of Regulation No 3950/92, requires the producer to demonstrate that he has 'resumed' deliveries of milk.

28. The Commission contends that the fact that the Court declared the 'anti-accumulation rule' invalid in the abovementioned judgment in *Wehrs* does not mean that the conditions laid down in Regulation No 857/84 in respect of the definitive allocation of a special reference quantity are inapplicable. The declaration of invalidity has effect *ex tunc*, and the provisional allocation of a reference quantity in accordance with SLOM II without taking the 'anti-accumulation rule' into consideration is therefore lawful, which means that the producers in question were in principle entitled to the allocation of such a reference quantity.

29. In this respect, the practical effectiveness (*effet utile*) of the provisions can be guaranteed only if the conditions are construed as if the legislature, when drafting the Regulation, was aware of the invalidity of the 'anti-accumulation rule' and if those conditions are applied, as so construed, also to cases such as that in point in the main proceedings. Conversely, should the prescribed conditions not be applied merely because they do not at all 'tally' with the situation of those producers, the risk would arise of unjustified discrimination to the detriment of those producers, who had not been allocated an original reference quantity and who were barred from producing milk.

30. In the light of that interpretation, the Commission considers it essential to examine the way in which the Council would have reacted, when drafting SLOM I and SLOM II, had it been aware that the 'anti-accumulation rule' was invalid. In the Commission's submission, Regulation No 2055/93, as interpreted above, provides the clearest indication.

31. In this context the Commission contends that what is here in point is an aid to interpretation and not an application by analogy of Article 1(1), final indent, of Regulation No 2055/93. The question, therefore, is not whether that regulation was already in force at the time when the HZA adopted the decision at issue in the main proceedings. Should, however, the Court choose not to follow the Commission on this and find that there was a 'gap' in SLOM II which cannot be filled by interpreting the applicable provisions, then an application by analogy of Article 1(1),

final indent, of Regulation No 2055/93 would fall for consideration because, at the time of the contested decision of the HZA (6 July 1994), that regulation was already in force and the HZA could have had recourse to it.

32. I do not agree with the Commission's reasoning here. The application of the conditions laid down in Regulation No 2055/93 for the award of a special reference quantity in the applicant's case is not permissible because, contrary to the arguments advanced by both the Commission and the applicant himself, the applicant was not entitled to the allocation, by his national authorities, of a special reference quantity in addition to the original reference quantity and, although he succeeded in obtaining that special reference quantity for himself, this did not establish any specific rights and obligations for him.

33. In particular, although it was acknowledged, substantively, in the judgment in *Wehrs*,[26] declaring the 'anti-accumulation rule' invalid, that a right to the award of a special reference quantity existed in principle for those producers, who, like the applicant, had already been allocated an original reference quantity at the time when the applicant succeeded in obtaining a special reference quantity, that right was not governed by Community law and therefore did not give rise to any specific obligations on the part of the competent national authorities or to any corresponding rights for the producer in question. As the Court held, significantly, in its judgment of 6 June 1996 in *Ecroyd*,[27] the fact that the 'anti-accumulation rule' was declared invalid in *Wehrs* does not result in any obligation or power on the part of the competent national authorities to allocate a special reference quantity. By reason of the complexity of the milk-quota system, the relevant legal framework, as it stood following the declaration of invalidity of the 'anti-accumulation rule', did not of itself, that is to say without adjustment of the system, permit a producer in the same situation as the applicant to be awarded a special reference quantity. In other words, the competent national authority was neither obliged nor empowered, prior to the adoption of other provisions of Community law curing the established invalidity, to award a special reference quantity to those producers who found themselves in the abovementioned situation.[28]

34. In light of the above, from the point of view of Community law, the applicant, who received a special reference quantity as a result of a national administrative measure at a time when the 'anti-accumulation

26 — Cited above in footnote 13.

27 — Case C-127/94 *The Queen* v *Ministry of Agriculture, Fisheries and Food, ex parte H. & R. Ecroyd Holdings Ltd and John Rupert Ecroyd* [1996] ECR I-2731.

28 — See paragraphs 57 to 59.

rule' was still applicable and prior to the entry into force of Regulation No 2055/93, would not appear to be the subject of any specific right or obligation in connection with the rules governing the accumulation of the two reference quantities, inasmuch as, at the time when the abovementioned national administrative measure was adopted, there was no specific body of rules of Community law which prescribed and regulated such accumulation. From the legal point of view, it was therefore impossible for a subjective situation deserving of protection to arise, that is to say, an established right to the award of a special reference quantity, to which the application of the conditions laid out in Regulation No 2055/93 might be envisaged. The application of this regulation to producers finding themselves in the same situation as the applicant would be tantamount to creating retroactively the missing legal framework for the accumulation of both quantities. Such a retroactive application of Regulation No 2055/93 is, however, not prescribed in the transitional provisions of that regulation and would constitute a manifest breach of the rule against the retroactive effect of Community regulations. [29]

35. It should be pointed out in this context that the application of the conditions laid down in Regulation No 2055/93 to the applicant's case would not be permissible even if one were to take the view that the applicant had acquired the right to accumulate an original and a special reference quantity. In such a case, it would have to be accepted, in light of the principle of legal certainty, that the rights and duties of the owner of a special reference quantity, who hopes that this quantity will become definitive, are fixed in accordance with the legal framework in force at the time when the special reference quantity in question was provisionally allocated to him. One could not reasonably maintain that the producer concerned must comply with conditions and obligations of which he had no knowledge at the start of the period for which conditions and prerequisites were laid down in respect of the definitive award of the special reference quantity. In any case it could certainly not be maintained that that producer must comply with conditions and obligations that were laid down after the abovementioned period had expired. In other words, it would not be permissible to apply the requirement for an increase in the production of the entire holding, and the prohibition on leasing out the primary quota that Regulation No 2055/93, which entered into force on 1 August 1993, would appear to lay down, to the decision regarding the definitive allocation of the special reference quantity, which was granted to the applicant in October 1991, that is to say, at a time when it was provided that the producer had to provide evidence as to his specific activity within two years following 1 July 1991. In such a case, the applicant's argument, to the effect that his situation was governed exclusively by SLOM I and SLOM II and had given him a legitimate expectation in that regard, would be well founded.

29 — In regard to this prohibition, see, for example, the judgment of the Court in Case 234/83 *Gesamthochschule Duisburg* v *Hauptzollamt München* [1985] ECR 327, paragraph 20.

36. By and large, I am of the opinion that Regulation No 2055/93 could not be retro-

actively applied to the applicant's case, either in order to give concrete form to the right to accumulation which he held *in abstracto* or in order to impose on him obligations which did not apply to him during the relevant period laid down in Article 3a(3), first sentence, of Regulation No 857/84 as amended by Regulation No 1639/91, which was in force at the time when the special reference quantity was provisionally allocated to him. [30]

37. It must next be pointed out that neither the Commission's argument on an aid to interpretation nor its argument on the application by analogy of Regulation No 2055/93 is well founded. First, the so-called aid to interpretation which in the Commission's submission could be derived from Regulation No 2055/93 would — as indicated above — be tantamount in substance to an unlawful retroactive application of that regulation, inasmuch as, during the relevant period, in relation to which the producer's activity is assessed, no legal framework existed which provided for and regulated the accumulation at issue and which would give rise to a question of interpretation. Furthermore, it is generally acknowledged that the use of a provision of Community law in order to interpret another provision adopted earlier, with regard to facts which arose when the earlier provision was in force, constitutes a case of retroactive application. [31] Second, the same is also true, in my view, as regards the so-called application by analogy, which the Commission proposes with the argument that the Regulation was in force at the time when the HZA adopted its decision (6 July 1994) and that the German national authority was therefore free to take it into consideration. As I have already stated, the question whether the applicant can claim entitlement to the definitive award of a special reference quantity is governed by the legal rules that were in force at the time when that quantity was provisionally allocated, and, possibly, during the period for which the producer was required to provide evidence of a specific activity, and not by the legal rules that were in force at the time when the HZA's decision refusing the definitive allocation of the special reference quantity was adopted. Consequently, the facts which it is sought to subject to rules analogous to those applying to the facts which, *ratione temporis*, fall within the scope of Regulation No 2055/93, actually fall, *ratione temporis*, within the scope of a different, earlier set of rules. This excludes application by analogy. In other words, the application of Regulation No 2055/93 by analogy, as envisaged by the Commission, entails, in reality, an unlawful retroactive application of the Regulation. Third, both the so-called aid to interpretation and the supposed application by analogy are based on the premiss that the Court itself will

30 — See judgment cited in footnote 29 *Gesamthochschule Duisburg*, in which the Court stated that the retroactive application of a regulation was inadmissible 'regardless of whether such an application might produce favourable or unfavourable effects for the person concerned' (paragraph 20).
As is also stated in the same paragraph of that judgment, the retroactive application of a regulation is not permitted 'unless a sufficiently clear indication can be found, either in the terms of the regulation or in its stated objectives, which allows the conclusion to be drawn that the regulation was not merely providing for the future'. Regulation No 2055/93 contains no such indication, nor could such an indication exist. It would be hard to imagine that this Regulation, which for the first time allows and regulates the accumulation of the respective reference quantities, could prescribe its application to producers who had already obtained special reference quantities in manifest contradiction with the 'anti-accumulation rule' previously in force.

31 — See the judgment cited in footnote 29, *Gesamthochschule Duisburg* v *Hauptzollamt München*, at paragraphs 19 and 20.

regulate — either by interpreting the provisions which existed before the declaration of invalidity of the 'anti-accumulation rule', or by filling the 'gap' which might be thought to have been the result of that declaration — the provisional accumulation which was created *de facto*, in the person of the applicant, by the administrative measure adopted by the competent German authority. This, however, would not appear to be in conformity with the separation of powers between the Court and the other institutions of the Community, such as the Council.

38. Although the Court is empowered to hold acts of the Council or other institutions of the Community to be invalid, it cannot assume their role particularly when they are vested with a wide discretion in choosing the most suitable measures. [32] In the present case it must be considered that such a discretion does in fact exist, and that the milk-quota system, as the Court stated in *Ecroyd*, [33] is so complex that the allocation of a special reference quantity to a producer who already had an original reference quantity under the conditions laid down in Article 2 of Regulation No 857/84, is not possible without adjusting the system by means of new provisions of Community law. [34]

39. Furthermore, the fact that the Court cannot assume the role of the Council and the other Community institutions cannot be affected by the specific nature of the position that the competent Community institution adopted at a later stage in exercising its discretion. The contrary view would — apart from the fact that it would clearly constitute a breach of the prohibition on the retroactivity of Community regulations — in the present case also be ineffective. It must not be forgotten that the technical difficulties associated with regulating the problem of one and the same producer accumulating an original and a special reference quantity have not been fully removed by Regulation No 2055/93. Article 1(1), last indent, of that regulation provides that a producer who has already been allocated an original reference quantity, as in the applicant's case, may be allocated a special reference quantity where he establishes, in support of his application, 'on the basis of criteria to be determined', that he is able to increase production on his holding by the amount of the special reference quantity applied for. Nor were these criteria comprehensively laid down in Regulation No 2562/93, cited above, as is clear from Article 4 of that regulation, according to which Member States are empowered to take into account criteria

32 — See also my Opinion in Case C-360/97 *Herman Nijhuis* v *Bestuur van het Landelijk Instituut Sociale Verzekeringen*, in which the judgment of the Court was delivered on 20 April 1999, [1999] ECR I-1919, point 49.

33 — See footnote 27.

34 — On the subject of the technical difficulties involved with the rules on milk quotas, see the Opinion of Advocate General Léger in *Ecroyd* (cited above at note 27), points 76 to 87.

in addition to those laid down in Article 2 of the Regulation. In other words, the application of Regulation No 2055/93 to the applicant's case would not result in a concrete and definitive resolution of his situation, because such a solution also depends on the Member States' exercising their discretionary power. In this context it should be pointed out that if that discretionary power were exercised and the criteria for calculating the increase in production pursuant to Articles 2 and 4 of Regulation No 2562/93 were defined, it would be hazardous to assume, in the context of transitional law, that the result of exercising that discretionary power is to be applied in order to regulate the situation created by the administrative decision of October 1991 allocating a special reference quantity to the applicant.

(*b*) *As to the determination of the provisions applicable to the plaintiff's situation*

40. Proceeding from the legal framework in force at the material time in the case in the main proceedings, the national court, as well as the parties who have submitted written observations, namely the Commission and the applicant, endeavour at certain points in their argument to resolve by way of interpretation the problem of the accumulation of the two reference quantities on the applicant's holding, still without referring to Regulation No 2055/93, which was enacted later. That attempt would, however, seem to be misconceived, either because, substantively, it does not avoid returning to the problem of the disguised retroactive application of that regulation or because it is in direct conflict with the conclusions following from the judgment in *Ecroyd*. [35]

41. The national court and the Commission assume that, first, the wording of Regulation No 857/84 does not rule out the possibility of a producer temporarily transferring the original reference quantity to another holding pursuant to Article 5c(1)(a) of Regulation No 804/68 following the allocation of a special reference quantity [36] and, second, that Article 3a(3), first sentence, of Regulation No 857/84 as amended by Regulation No 1639/91 requires, pursuant to the wording incorporated in Article 4(3), first sentence, of Regulation No 3950/92, that the producer 'resume' milk production within a specific period and that he prove that he is justified in his expectation of being able to continue milk production following the expiry of the non-marketing period. However, the national court and the Commission argue that the abovementioned article is to be interpreted in terms of its purpose, namely as meaning that these producers who find

35 — See footnote 27.

36 — As the Commission has stated, the case of a producer leasing out the original reference quantities before being allocated a special reference quantity is not comparable with the case in point in the main proceedings, so that it does not need to be examined here.

themselves in the same situation as the applicant have to prove that, following the allocation of a special reference quantity, they increased production correspondingly and did not simply use the allocation of a special reference quantity as an opportunity to exploit their new production possibilities in other ways, or to leave them completely unexploited by ceasing to deliver the original reference quantities or transferring them to another holding for temporary use. [37]

42. It is evident, that, underlying the determination, as mentioned above, of the provision whose interpretation is sought in the present proceedings is the intention to regulate the consequences of the *Wehrs* judgment in cases such as that of the applicant by interpreting the pre-existing provisions of Community law, an interpretation essentially inspired by the rules subsequently introduced by Regulation No 2055/93. Leaving aside the questions of unlawful retroactivity or ineffective application of that regulation, which result from that interpretation and which have been examined above, I am of the opinion that the adoption of such a solution by the Court would be in conflict with the conclusions reached in *Ecroyd*. More specifically, as I have already pointed out, since in *Wehrs* the Court declared the 'anti-accumulation rule' invalid, it is solely the

37 — The national court is of the opinion that the purpose of the article is, precisely, to ensure that the allocated special delivery reference quantities are in fact produced by the producer entitled to them. The allocation of a special reference quantity may therefore not be used by the producer to market or otherwise exploit the milk quotas, but may only be used to produce milk himself. Furthermore, it is with this purpose that Article 3a(4) of Regulation No 857/84 expressly prohibits the temporary transfer of the special reference quantities as referred to in Article 5c(1)(a) of Regulation No 804/68.
According to the national court, the historical background to Article 3(a)(3) of Regulation No 857/84 might suggest that a milk producer, in the same situation as that of the applicant, must prove that, following the provisional allocation of a special reference quantity, he correspondingly increased production during the 12-month period specified in the Regulation. The wording of the Regulation is clearly directed solely to those producers who had not been allocated a reference quantity before the SLOM regime entered into force and whose fundamental rights had, consequently, been infringed by their definitive exclusion from milk production and who through the actions they brought and their success before the Court of Justice caused the legislature to supplement the milk levy by the SLOM regime. The legislature was still not able to enact express rules governing the claims of those producers who had already been allocated an original reference quantity because this category of producers was first taken into consideration in the SLOM regime only following the abovementioned *Wehrs* judgment, with the adoption of Regulation No 2055/93 (SLOM III). Consequently, this category of producers could not, in principle, benefit from the allocation of a special reference quantity under SLOM I and SLOM II, even at the time Regulation No 3950/92, cited above, was enacted. However, if they were not required to increase their milk production as a condition for the definitive allocation of the quota in question, in view of the seriousness of their intention to use the previously excluded possibility of resuming (increased) milk production free from levy, they would be in a better position than producers who had been totally excluded from levy-free milk production and whose situation the legislature surely had in mind when drafting Regulation No 857/84 and Article 4(3) of Regulation No 3950/92, as can be seen from the chronology of those regulations.
The Commission is of the opinion that SLOM I, SLOM II and SLOM III are intended to enable milk producers who had entered into non-marketing or conversion undertakings under Regulation No 1078/77 to pursue their earlier business activity also within the framework of the new milk-quota system. In this context, it follows from the judgment in *Von Deetzen*, cited in footnote 7, that the conditions attached to the allocation of a special reference quantity were intended to prevent those producers from obtaining a purely financial advantage from that allocation, in that they had recourse to the commercial value that the reference quantities had acquired in the meantime. According to the Commission, this is confirmed by the sixth recital in the preamble to Regulation No 764/89 and by the eighth recital in the preamble to Regulation No 1639/91. Article 3a(4)(1) of Regulation No 857/84, which contains the prohibition on leasing out a provisional special reference quantity, pursues the same objective. The Commission thus considers that, from an economic point of view, there is no difference between leasing out a provisional special reference quantity and the original reference quantity which had already been allocated to the producer, because, in each case, he derives a purely financial advantage by delivering only part of the total reference quantity allocated to him. This interpretation points to the conclusion that the situation of producers who are in a situation analogous to that of the applicant in the main proceedings is treated differently from that of producers who only have an original reference quantity. However, that unequal treatment is objectively justified and does not infringe the principle of non-discrimination set out in Article 40(3) of the EC Treaty (now, after amendment, Article 34(3) EC).

Council which can and should [38] enact new Community legislation in order to cure the invalidity declared by the Court. Consequently, prior to the adoption of Regulation No 2055/93, neither the competent national authorities nor the Court were in a position to specify the precise conditions and requirements to which that regulation would subject the allocation of quotas.

43. The same is true as regards the applicant's submissions. After excluding the applicability of SLOM III to his situation, he goes on to propose an interpretation of SLOM I and SLOM II, according to which the leasing out of the original reference quantity is permissible where this co-exists with a special reference quantity and the obligation to deliver milk is limited to the amount of the latter quantity. [39] As has been rightly pointed out by the national court, underlying the argument advanced by the applicant, which in broad outline is also to be found in his reply to the Court's written question as to whether or not his constitutes a single holding, is the interpretation to the effect that, at the time when he was allocated the special reference quantity, the producer in question did not operate a single holding, but that the two distinct

38 — In regard to the duty of the competent Community institutions to take the necessary measures in order to ensure compliance with a preliminary ruling which declares an act of that institution invalid, see, for example, judgment in Case 300/86 Luc *Van Landschoot* v NV *Mera* [1988] ECR 3443, paragraph 22. See also the Opinion of AG Léger in *Ecroyd* (cited in footnote 27), point 85 et seq.

39 — The applicant states that neither SLOM I nor SLOM II contains a provision requiring those producers who have been allocated a provisional special reference quantity to continue production and to deliver the original reference quantity themselves. On the other hand, because of the 'anti-accumulation rule' those producers were denied such quotas. Consequently, the preliminary question refers to a SLOM III producer and cannot apply to the situation of the applicant.
The applicant also argues that the Finanzgericht and the HZA misdirected themselves as to the legal nature of the annual leasing agreements authorised by Paragraph 7(a) of the Milchgarantiemengen-Verordnung (MGVO, regulation guaranteeing quantities of milk), in the version in force on April 24, 1991. According to the applicant, under such an agreement the producer's legal status remains unaffected, whereas the reference quantity is delivered by the tenant; the right to carry out deliveries reverts to the producer at the end of each milk-production year.
The applicant also refers to the principle of equal treatment. Any discrimination between those producers who leased out their original reference quantities before requesting the allocation of a special reference quantity and those producers who entered into leasing agreements only after being provisionally allocated a special reference quantity is prohibited. The authorisation of leasing agreements implies option rights in favour of the tenant, as long as such agreements have been authorised by the Member State in question. The constitutional principle of non-discrimination precludes depriving of the special reference quantity those SLOM III producers who concluded leasing agreements in regard to their original reference quantities after a quota had been allocated to them in their capacity as producers having entered into non-marketing undertakings, whereas the producers in this category who had already availed themselves of this possibility, would be able to preserve their additional reference quantities.
Lastly, the applicant contends that, in subordinating the allocation of special reference quantities to the condition that the producer has resumed milk production and the delivery of the special reference quantity, the legislature's sole intention was to prevent milk producers from using the quota as an asset which could be exploited in the context of a leasing agreement. On the other hand, it did not intend to contribute to an increase in the production of milk in the Community. However, according to the applicant, such an increase would be the logical consequence of the obligation incumbent on producers to deliver personally both their original and special reference quantity.

reference quantities which he received corresponded, in reality, to two parts of his holding, which can be considered as separate from both a factual and a legal point of view: on the one hand, that part of the original holding for which the original reference quantity under Article 2 of Regulation No 857/84 had been allocated, and, on the other hand, that part of the holding corresponding to the areas he had leased from his uncle and in respect of which he had entered into a non-marketing undertaking, justifying the allocation of a special reference quantity. By dividing the production capacities of his holding and therefore, in a way, the holding itself, into two parts, the applicant is attempting to attribute the quantities of milk produced to the special delivery reference quantity, and to transfer to another holding the original reference quantity, to be considered as lawfully not delivered by himself.

44. The applicant's arguments could form the basis for an extensive debate on the proper way to regulate the accumulation of an original reference quantity with a special reference quantity in relation as well to the approach which must be taken as to the meaning to be assigned to the term 'holding'. [40] However, such a debate would be founded on the same erroneous premiss as the interpretations proposed by the national court and the Commission. Moreover, the fact that the provisions finally enacted in Regulation No 2055/93 appear to contradict the reasoning of the applicant cannot justify the conclusion that this reasoning is any less correct than that of the Commission, which is in conformity with the provisions of the abovementioned regulation. Since only the Community legislature is competent originally to enact the relevant legislation and since, in exercising its powers, it cannot be replaced, any alternative interpretation which is not founded on this law-making action by the Community legislature, is, as such, arbitrary and must be rejected, irrespective whether or not it is in conformity with the subsequent expression of the will of the Community legislature.

45. In the final analysis, it follows from the impossibility for the interpreter of the

40 — For example, the HZA, as it does in its answer to the Court's written question whether or not there is a single holding, considers that the applicant only operated a single holding. Furthermore, the national court considers it questionable whether, merely because the possibilities of levy-free milk production accorded to a holding have different legal bases, it may be said that only the part of the production quota established on one of those legal bases and not the part established on another of those bases may be transferred to a third party, which presupposes a fictional division into different categories of the milk production of that single holding. Lastly, in answer to the Court's written question, mentioned above, the Commission considers that, within the framework of the application of Regulation No 3950/92, the production facilities operated by the applicant on German territory must be regarded as a single holding, irrespective of their material and legal situation. Moreover, as I have already pointed out, the Commission considers that, from an economic point of view, there is no difference between the leasing out of a provisional special reference quantity and that of an original reference quantity already allocated to the producer, because, in each case, the producer benefits from a purely financial advantage by delivering only part of the global reference quantity allocated to him.

provision to which the present reference for a preliminary ruling relates to assume the role of the Community legislature or to anticipate its action that he cannot avoid the literal and systematic interpretation of that provision, an interpretation which, on account of its clarity, must prevail in the present case over a teleological approach. In other words, the semantic content of Article 3a(3), first sentence, of Regulation No 857/84, as amended by Regulation No 1639/91, which was incorporated in Article 4(3), first sentence, of Regulation No 3950/92, can be understood only in the context of the 'anti-accumulation rule'. In respect of the material time in the case in the main proceedings, any other approach would appear to constitute a proposal *de lege ferenda*, which, although it might be logical, is nevertheless arbitrary in law.

46. In light of the foregoing considerations, the question referred to the Court by the Bundesfinanzhof should be answered as follows: on its proper construction, the provision contained in Article 3a(3), first sentence, of Regulation No 857/84, as amended by Regulation No 1639/91, which was incorporated in Article 4(3), first sentence, of Regulation No 3950/92, is not applicable to a producer who finds himself in the same situation as the applicant, that is to say, who has already been allocated an original reference quantity under Article 2 and/or 6 of Regulation No 857/84.

47. I admit that, at first sight, this proposition does not appear to be wholly satisfactory. The impression is given that the legal situation of those producers finding themselves in a position similar to that of the applicant is not regulated by Community law, whereas the national administrative measure which provisionally allocated a special reference quantity to them, even where that allocation became definitive, loses the practical significance which those producers expected.

48. Nevertheless, this is merely an impression which should not lead to calling in question the correctness and the appropriateness of the proposition set out above. Various reasons, which I will now set out, militate in favour of this conclusion.

49. First, the situation in which the applicant finds himself has a remarkable feature which is to be traced both to the shortcomings and repeated amendments of Community law and to the originally manifest illegality of the administrative measure which provisionally allocated the special reference quantity. This producer procured a provisional special reference quantity by means of a national administrative measure which was adopted in the absence of any legal framework at Com-

munity level relating to the accumulation of an original quota with a special reference quantity. On account of this peculiarity there will, in practice, hardly be many other producers in the Member States of the Union who are in the same situation as that of the applicant.

50. Second, from the point of view of Community law, it must be considered that the *Wehrs* judgment does not result in the national administrative measure provisionally allocating the special reference quantity, a measure unlawful *ab initio* for lack of competence to adopt it, becoming lawful. As I have already pointed out, in *Ecroyd* the Court refused to recognise the power of national authorities (circumscribed or discretionary power) to allocate such a quantity prior to the enactment of other Community provisions curing the established invalidity of the 'anti-accumulation rule'. Consequently, the applicant, even though he was, in principle, entitled to accumulation of the reference quantities, had no specific right to it under Community law *vis-à-vis* the national authorities. Since there was no legal framework at Community level governing that accumulation, it must be considered that the administrative measure provisionally allocating the special reference quantity did not create for the applicant a situation calling for protection under Community law, either on the basis of the specific provisions of the Community regulations relating to milk quotas or on the basis of the general principle of the protection of legitimate expectations.

51. As regards the last-mentioned principle, it should, moreover, be pointed out that it is scarcely arguable that a situation was created in which the applicant could entertain a legitimate expectation with regard, on the one hand, to the special reference quantity which had been allocated to him provisionally and, on the other, to the regulation of the definitive allocation of that quantity under the conditions cited by him, since his application to obtain that quantity and its subsequent provisional allocation (October 1991) were events that manifestly occurred before the entry into force of Regulation No 2055/93 (1 August 1993), and at a time when the 'anti-accumulation rule' was applicable, and before the delivery of the judgment in *Wehrs* declaring that rule to be invalid.

52. Third, were the applicant to invoke the initial illegality of the abovementioned national administrative measure, on the ground of lack of competence to adopt it, and/or the definitive character of that

measure, this might establish rights, *vis-à-vis* the national authorities, enabling him to oblige those authorities to act, abstain from acting or pay him compensation, rights which might be provided by national law [41] and which would not be amenable to review by the Court. On the other hand, in the context of Community law, it would be of no avail to the applicant for him to invoke the definitive character of the administrative act in question and the resulting legitimate expectation on his part *vis-à-vis* the national authorities. One cannot determine the meaning of the Community regulations by construing them in accordance with the content of the implementing administrative measures adopted by the national authorities — all the more so when those measures are, from the outset, contrary to Community law — or in accordance with the content of the national rules governing the conditions under which national administrative acts become definitive. As the Court has, moreover, held in the context of national rules governing the revocation of acts of the national administrative authorities, where such rules play a functional role in the administration of the Community and, specifically, in the implementation of measures falling under the common agricultural policy, they apply 'subject to the limits imposed by Community law' and 'must not have the effect of making it virtually impossible or excessively difficult to implement Community rules'. [42]

53. Fourth, Community law is not short of provisions which could be applied to the situation of the applicant and to that of producers who find themselves in the same situation and for whom Regulation No 2055/93 can no longer apply. [43] In particular, this situation could engender rights to damages for the producers if and in so far as it is held that they can invoke the liability incurred by the Community. [44]

41 — Broadly speaking, when the applicant contends that the administrative act in question has already become definitive, he plainly implies that under German law it is not amenable to review by the courts and cannot be revoked. Ultimately, it is only a national court which is competent to rule on this matter, examining also, if necessary, the question whether the producer concerned and the competent administrative authority were in good faith at the time the act at issue was adopted.

42 — See for example the judgment of the Court in Case C-366/95 *Landbrugsministeriet - EF-Direktoratet* v *Steff-Houlberg Export I/S and others* [1998] ECR I-2661, paragraphs 14 and 15.

43 — In this respect, it should be noted that, under Article 7 of Regulation No 2055/93, the producers in question were required to submit their application for the allocation of a special reference quantity prior to 1 November 1993.

44 — An analysis of the conditions under which and the extent to which the Community may be liable in damages *vis-à-vis* the applicant falls outside the scope of the present case. I shall limit myself to the observation that the obligation to pay damages has already been recognised, at least with regard to the producers who, in a general manner, had suffered injury because of the ceaseless amendments to the Community legislation and, in particular, with regard to those who had been unable to obtain in any form a special reference quantity as a result of the 'anti-accumulation rule'. See, for example, judgment of the Court in Joined Cases C-104/89 and C-37/90 *J. M. Mulder and others and Otto Heinemann* v *Council of the European Communities and Commission of the European Communities* [1992] ECR I-3061; Communication 92/C 198/04 of the Council and the Commission of 5 August 1992 (OJ 1992 C 198, p. 4) and Council Regulation of 22 July 1993, (EEC) No 2187/93, providing for an offer of compensation to certain producers of milk and milk products temporarily prevented from carrying on their trade (OJ 1993 L 196, p. 6).

V — Conclusion

54. In light of all the foregoing considerations, I propose that the Court answer the question referred to it by the Bundesfinanzhof for a preliminary ruling in the following terms:

The provision contained in Article 3a(3), first sentence, of Council Regulation (EEC) No 857/84 of 31 March 1984 adopting general rules for the application of the levy referred to in Article 5c of Regulation (EEC) No 804/68 in the milk and milk products sector as amended by Council Regulation (EEC) No 1639/91 of 13 June 1991, a provision incorporated in Article 4(3), first sentence, of Council Regulation (EEC) No 3950/92 of 28 December 1992 establishing an additional levy in the milk and milk products sector is to be interpreted as meaning that it does not apply to milk producers who find themselves in the same situation as that of the producer in question in the main proceedings.